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No. 95-617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ELIZABETH G. CURTIS, *et al.*

Petitioners,

v.

SCHOOL COMMITTEE OF FALMOUTH, *et al.*

Respondent.

Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

REPLY TO BRIEF IN OPPOSITION

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10 pp

TABLE OF CONTENTS

Page

Table of Authorities ii
Reply Argument 1
I. The Decision of the Massachusetts Supreme Judicial Court Conflicts with a Decision of "A State Court of Last Resort," as That Phrase Is Used by this Court 2
II. *Alfonso* Decided an Important, Unsettled Question of Federal Law 3
III. The Issues Presented Warrant Plenary Review 5
Conclusion 6

TABLE OF AUTHORITIES

Page(s)

CASES

Alfonso v. Hernandez, 195 A.D.2d 46, 606 N.Y.S.2d 259 (1993), *leave to appeal dismissed*, 83 N.Y.2d 906, 637 N.E.2d 279 (N.Y. 1994) ..... 1, *passim*
Mellon v. O'Neill, 275 U.S. 212 (1927) 3
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 6
Thomas v. Review Board, 450 U.S. 707 (1981) 5
Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) 6
United States v. Title Insurance & Trust Co., 265 U.S. 472 (1924) 3-4
Wisconsin v. Yoder, 406 U.S. 205 (1972) 6
Woods v. Interstate Realty Co., 337 U.S. 535 (1949) ... 4
Zorach v. Clauson, 343 U.S. 306 (1952) 5, 6

RULES

S.Ct. Rule 10(b) 2, 3

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REPLY ARGUMENT

The Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts should be granted that this Court may consider and settle an important, but unsettled question of federal law. In their Brief in Opposition Respondents have failed to undercut the substantial basis for review on certiorari in this case.

First, the Respondents erroneously assert that *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993), *leave to appeal dismissed*, 637 N.E.2d 279 (N.Y. 1994), is not a decision of a state court of last resort as required by Rule 10(b) of this Court's rules. Where review in the highest state court lies within the discretion of that court, and an

application for such review is denied, the decision of an inferior state court is treated as a decision by a state court of last resort. *See* Argument I, *infra.*

Second, Respondents erroneously assert that the Petition does not demonstrate a real decisional conflict, because the decision of the substantial federal question in *Alfonso* was mere dicta. The *Alfonso* Court reached and decided the substantial federal question; the separate decision on a state law matter does not convert the decision on the federal question into mere dictum. *See* Argument II, *infra.*

Third, the decision of the court below directly conflicts with the decision of a state court of last resort of another State. To justify the burdening of the substantial federal rights in this case, Respondents assert that the condom policy is voluntary, not coercive, because parents can satisfy the compulsory attendance obligation imposed under state law by sending their children to private or parochial schools. Respondents' notion of voluntariness conflicts with the settled principle that one may not be forced to select between enjoying a constitutional right and participating in a generally available public program.

I. THE DECISION BELOW CONFLICTS WITH A DECISION OF "A STATE COURT OF LAST RESORT."

Respondents propose that no conflict cognizable under Rule 10(b) of this Court's Rules has been shown in the Petition. *See* Opp. at 2-4. Respondents doubt that *Alfonso v.*

Hernandez, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993), *leave to appeal dismissed*, 637 N.E.2d 279 (N.Y. 1994), constitutes the decision of a state court of last resort. Respondents are wrong in their premise.

This Court has said that, where review in New York Court of Appeals is discretionary and an application for leave to appeal was refused by the Court of Appeals, the decision of the Appellate Division *is* a decision by a state court of last resort. *See Mellon v. O'Neill*, 275 U.S. 212, 213 (1927) ("[l]eave to appeal to the Court of Appeals was denied . . . and the judgment of the Appellate Division thereby became the final decision of the highest court of the State in which a decision could be had").

In *Alfonso*, leave to appeal was sought from and denied by the New York Court of Appeals. *See Alfonso v. Hernandez*, 637 N.E.2d 279 (N.Y. 1994) (motion for leave to appeal dismissed). Thus, *Alfonso* meets the requirements of Rule 10(b). *Alfonso* is a decision of a state court of last resort. And, as shown in the Petition, the judgment below and the decision in *Alfonso* stand in sharp conflict.

II. *ALFONSO* DECIDED AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW.

Respondents surmise that the resolution of the substantial federal question in *Alfonso* constituted mere dicta, *see* Opp. at 2-5, because the *Alfonso* court also decided the case on an independent state law ground, *see* Opp. at 4-5. Respondents err in that premise as well. In *United States v.*

Title Insurance & Trust Co., 265 U.S. 472 (1924), this Court answered a contention much like the one made by Respondents here. There this Court said:

> [I]t is urged that what we have described as [a] rul[ing] there was obiter dictum, and should be disregarded, because the court there gave a second ground for its decision, which was broad enough to sustain it independently of the first ground. The premise of the contention is right, but the conclusion is wrong; for where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.'

265 U.S. at 486 (citations omitted). *See also Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum") (citing cases).

Respondents' error is plain. Because the decision in *Alfonso* can be supported by that court's determination of a statutory right under New York law, Respondents would reduce that court's *holding* regarding a federal constitutional right to dicta. The result in *Alfonso*, however, is adequately supported on either ground. Consequently, under the rule in *Title Insurance and Trust Co.*, 265 U.S. at 486, Respondents' contention -- that the resolution of the substantial federal question in *Alfonso* was mere dicta -- is wrong.

III. THE ISSUES PRESENTED WARRANT PLENARY REVIEW.

In Falmouth, Massachusetts, a school may -- nay, must -- give a condom to any junior high or high school student who requests one, even if that student's parents have not consented and have specifically directed the school not to give their child a condom. The premise of the decision in the court below -- that this policy does not even impose a threshold burden on the rights of parents to direct the upbringing of their children -- conflicts not only with *Alfonso v. Hernandez* but also with common sense. Pet. § III.

Respondents maintain that the condom policy is voluntary as to parents because parents can choose to take their children out of public school. Opp. at 8. This argument suffers from at least two flaws. First, as a practical matter, public school is the only option for parents who lack the means to select a private school alternative. Second, forcing parents to forego a public benefit (publicly funded education) to exercise their fundamental parental prerogative itself constitutes a clear burden on parental liberty. *Thomas v. Review Board*, 450 U.S. 707, 716 (1981) ("a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program"); *id.* at 717 ("Governmental imposition of such a choice puts the same kind of burden upon the [right] as would a fine imposed [for its exercise]") (internal quotation marks and citation omitted).

Respondents cite *Zorach v. Clauson*, 343 U.S. 306 (1952), for the proposition that a voluntary public school program is constitutional. Opp. at 9. But the program in

Zorach respected parental wishes: the challenged program took place at a distinct location off school grounds, and "[a] student is released on written request of his parents." 343 U.S. at 308. The Falmouth condom program, by contrast, takes place on school premises, requires no parental consent, and, in fact, disregards contrary parental instructions.

"In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 511 (1969). "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Hence, the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

The Falmouth School Committee has left parents out of the childrearing equation in the crucial area of childhood sexual development. "It is clear that such an intrusion by a State into family decisions . . . would give rise to grave questions . . . comparable to those . . . presented in *Pierce* . . . ." *Yoder*, 406 U.S. at 231-32. This Court should grant review to address those "grave questions."

CONCLUSION

For the foregoing reasons, this Court should grant this petition and set the case for plenary review.

Respectfully submitted,

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